March 27, 2025

U.S. Election Assistance Commission
633 3rd Street NW, Suite 200
Washington, DC 20001

Re: The Commission is Not Authorized to Implement Executive Order on Preserving and Protecting the Integrity of American Elections

Dear Commissioners,

On behalf of the Brennan Center for Justice, the American Civil Liberties Union, the League of Women Voters of the United States (the "League"), the Legal Defense Fund, and the National Association for the Advancement of Colored People ("NAACP"), we write to explain that you may not take any action in response to the President's Executive Order of March 25, 2025 (the "Order"), titled "Preserving and Protecting the Integrity of American Elections." The Order itself is unlawful as it relates to the U.S. Election Assistance Commission (the "Commission"), and it would, in any event, also be unlawful for the Commission to take several of the actions directed by the Order.

The Order purportedly directs the Commission to: (1) amend the federal voter registration form to include a requirement for "documentary proof of United States citizenship;" (2) withhold funding from states that do not include a documentary proof of citizenship requirement as set forth in the Order, or that do not reject mail ballots received after Election Day even if timely under state law; and (3) amend the Voluntary Voting System Guidelines, including to prohibit the use of certain voting systems, and rescind all previous certifications of state systems. These directives are unlawful and the Commission should take no action in response.

As you know, in 2016, the League, the Georgia State Conference of the NAACP, and others, represented by some of the undersigned groups as counsel, filed a suit against the Commission and its Executive Director challenging the Executive Director's decision to allow states to require documentary proof of citizenship with the federal form. In 2021, a federal court entered summary judgment in the Plaintiffs' favor.[1]

[1] *League of Women Voters of U.S. v. Harrington*, 560 F. Supp. 3d 177 (D.D.C. 2021).

The Federal Voter Registration Application

Section 2 of the Order purports to direct the Commission to require applicants for voter registration to provide a passport or another designated form of "documentary proof of citizenship" as part of the federal mail voter registration application form ("federal form"). But the President lacks authority to regulate the federal form in any way or to impose a mandate on the Commission regarding the contents of this form. Nor can the President or anyone require the Commission to implement a policy in conflict with federal law and the U.S. Constitution.

First, as you know, Congress created the Commission with the express intent that it be an "independent" agency, not subject to the President's direction.[2] The Commission was created by the Help America Vote Act of 2002 (HAVA).[3] It is also expressly designed to be bipartisan in both its prescribed composition and decision-making rules. It is comprised of four commissioners, two from each major political party.[4] And while the President appoints these commissioners (subject to Senate approval), he may not direct the Commission, as its role and duties are determined by Congress.[5] Additionally, HAVA requires that "any action which the Commission is authorized to carry out…may be carried out only with the approval of at least three of its members," ensuring that no decision can be made without bipartisan support.[6] The independent and bipartisan nature of the Commission is essential to its creation, and Congress was clear that no political party should control decisions related to federal elections.

Second, under Article I, Section 4, only Congress, not the President, can alter or supersede state procedures governing federal elections, including voter registration procedures. Forcing states to require documentary proof of citizenship would therefore require congressional action.

Third, the Order is not binding because it usurps the role of Congress, which has established rules for the contents and management of the federal form. The National Voter Registration Act (NVRA), as amended by HAVA, specifically commits the creation and maintenance of the federal form to the Commission, and not to the President or any other officer.[7] Put another way, the Commission is the only entity empowered by Congress to alter the contents of the federal form, consistent with the mandates of the statute. Both the NVRA and HAVA specify the procedural steps that the Commission must take before amending the federal form. Under

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[2] 52 U.S.C. § 20921.
[3] Pub. L. No. 107-252, § 201, 116 Stat. 1666 (2002).
[4] 52 U.S.C. § 20923.
[5] *See Seila Law v. CFPB*, 591 U.S. 197, 216-18 (2020) (discussing how multimember, bipartisan agencies can be insulated from President's ability to remove agency officials).
[6] 52 U.S.C. § 20928.
[7] 52 U.S.C. § 20508(a)(2); 52 U.S.C. § 20929.

Section 9(a)(2) of the NVRA, the Commission must consult with states to "develop a mail voter registration application form for elections for Federal office."[8] Indeed, the Commission has no regulatory or rulemaking authority that would impose any requirement on a state or locality other than that.[9] And under HAVA, as noted above, any decisions relating to the federal form must be made by three of the agency's commissioners.[10]

Fourth, in addition to procedural requirements that prescribe how the Commission may modify the federal form, the NVRA sets substantive limits on what the form can require of applicants. Section 9(b) of the NVRA prescribes the contents of the registration form.[11] In this statute, Congress prescribed that the form may require "only such identifying information. . .as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."[12] Congress directed that the form contain "identifying information" and prohibited any requirement for "authentication."[13] In other words, Congress wanted to allow only information that can be written on a form. Additional separate documentation of citizenship is not "identifying information."

Additionally, before implementing the directed changes to the federal form, the Commission would have to make a reasoned determination—by a three-vote majority—that the change is necessary to assess voter eligibility.[14] But the Commission could not, consistent with the NVRA, make such a determination, because a passport, for example, is *not* "necessary" to determining voter eligibility, as required under the NVRA.[15] Indeed, when Kansas enacted and implemented a documentary proof of citizenship law, a federal district court held—and the Tenth Circuit affirmed—that the state's requirement of citizenship documents to register to vote violated Section 5 of the NVRA. *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

This decision is relevant because the requirements of Section 5(c)(2)(B) of the NVRA similarly address what information is "necessary" to determine voter eligibility. That provision specifies

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[8] 52 U.S.C. § 20508(a)(2).
[9] 52 U.S.C. § 20929.
[10] 52 U.S.C. § 20928.
[11] 52 U.S.C. § 20508(b); *see also League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016) ("[S]ection 20508(a)(2) directs the Commission to create the Federal Form and section 20508(b)(1) sets limits on the contents of that form."); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 18 (2013) (Section 9(b)(1) of the NVRA "acts as both a ceiling and a floor with respect to the contents of the Federal Form").
[12] 52 U.S.C. § 20508(b)(1).
[13] 52 U.S.C. § 20508(b)(1) & (b)(3).
[14] 52 U.S.C. § 20928; *see also League of Women Voters of the U.S. v. Harrington*, 560 F. Supp. 3d 177 (D.D.C. 2021).
[15] 52 U.S.C. § 20508(b)(1).

that a voter registration form offered by a state department of motor vehicles can only require the "minimum amount of information necessary" to prevent duplicate registrations and assess voter eligibility.[16] In *Fish*, the Tenth Circuit confirmed that there exists a "presumption that the [citizenship] attestation [requirement] constitutes the minimum amount of information necessary for a state to carry out its eligibility-assessment and registration duties."[17]

Fifth, the Executive Order's documentary proof of citizenship policy violates the U.S. Constitution by imposing an undue burden on the constitutional right to vote. The United States Court of Appeals for the Tenth Circuit held, in 2020, that the Fourteenth Amendment to the U.S. Constitution prohibited Kansas from requiring documentary proof of citizenship to register to vote.[18] The types of proof the Order contemplates are even more burdensome than the Kansas law struck down in *Fish*. The Kansas law blocked more than 31,000 would-be voters from registering while it was in effect.[19] For comparison, the policy contemplated by the Order could block millions of Americans from registering to vote in federal elections.[20] Among those Americans, Black registrants will be significantly impacted.[21]

Under existing federal law, the authority to change the federal form rests with the Commission alone, and at minimum, a three-vote, bipartisan majority of the commissioners. The Executive Order would have the Commission violate its own authorizing statute under HAVA, as well as the NVRA and the U.S. Constitution.

Sixth, Section 2 of the Order also purports to direct the Commission to make these changes to the federal form within 30 days. Even if the proposed changes were allowed under the U.S. Constitution and federal law, this time frame is not possible. Under the Administrative Procedure Act, changes to the federal form seeking to add new requirements for the collection of information should go through a notice and comment process.[22] This process includes publication of the proposed changes in the Federal Register before those changes are implemented. Moreover, the federal form is an Information Collection Request (ICR), and any

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[16] *See Fish v. Kobach*, 840 F.3d 710, 738 (10th Cir. 2016).
[17] *Fish v. Schwab*, 957 F.3d 1105, 1142 (10th Cir. 2020) (citing *Fish v. Kobach*, 840 F.3d 710, 739 (10th Cir. 2016)).
[18] *Id*. at 1121.
[19] *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1113 (D. Kan. 2018), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).
[20] Kevin Morris and Cora Henry, "Millions of Americans Don't Have Documents Proving Their Citizenship Readily Available," Brennan Center for Justice, June 11, 2024, https://tinyurl.com/bdebpzbm.
[21] *See id.*
[22] 5 U.S.C. § 553.

changes to the form would also require a separate notice and comment process, and approval from the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA).

The federal form already has an OMB Number (3265-0015), and is actually going through a version of this process now for the purpose of confirming that no changes have been made to the ICR since the last time OMB gave its approval. But the proposed changes sought by the Order would have to go through a new notice and comment. And as there are no immediately pending federal elections, the PRA normal 60-Day and 30-Day notice periods would be required.

Commission Funding to States

Sections 4(a) and 7(b) of the Order further purport to direct the Commission to withhold funding from states that do not comply with the Order's documentary proof of citizenship requirement, or do not reject mail ballots received after Election Day. But the President has no authority to direct the Commission in this way.[23] For the reasons stated above, the President cannot direct the Commission, an independent bipartisan agency. Moreover, neither the President nor the Commission can unilaterally impose conditions on federal funding without congressional approval.

Indeed, it is well-established that Congress must clearly authorize any spending condition.[24] An agency that acts without congressional authority, as the Order directs the Commission to do, not only violates the Administrative Procedure Act,[25] but also the constitutional separation of powers.

Congress, though HAVA, has authorized the Commission to condition state funding on compliance with certain enumerated federal voting laws.[26] However, the documentary proof of citizenship requirement that the Order purports to impose is not among those federal statutes.[27] Neither the Commission nor the President may add to that list without congressional approval. Moreover, as described above, the documentary proof policy would *violate* the NVRA and the U.S. Constitution. Similarly, the statutes setting the time for federal elections are not among the laws with which states must certify compliance under HAVA.[28] Nor do those laws setting Election Day prohibit the counting of ballots postmarked by, but received after Election Day,

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[23] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").
[24] *See, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (explaining that when an executive agency administers a federal statute, the agency's power to act is "authoritatively prescribed by Congress").
[25] *See* 5 § U.S.C. 706(2)(C).
[26] 52 U.S.C. § 21003(b)(3).
[27] 52 U.S.C. § 21145(a).
[28] 2 U.S.C. § 7; 3 U.S.C. § 1.

which Congress or states have the authority to allow.[29] The Order cannot require the Commission to condition state funding on policies adopted only by the Order itself.

Voting Machines and Systems

Section 4(b)(i) of the Order purports to direct the Commission to amend the Voluntary Voting System Guidelines (VVSG) 2.0 so that the guidelines prohibit the use of barcodes or quick-response ("QR") codes to encode votes and require voting systems to provide a voter-verifiable paper record. Section 4(b)(ii) purports to direct the Commission to — within 180 days of the Order — rescind all previous certifications of voting equipment based on prior standards and, if appropriate, re-certify voting systems under the amended VVSG 2.0 guidelines. Here, too, the President has no authority to direct the Commission to take these actions.

Moreover, if the Commission acts to amend VVSG 2.0 in accordance with the Order, any changes must follow the specific timelines and processes for adopting VVSG guidelines set by federal law. Specifically, 52 U.S.C. § 20962 outlines several steps that the Commission must follow before adopting new or modified guidelines.

- First, the Commission must publish notice of the proposed guidelines in the Federal Register, provide an opportunity for public comment, and provide an opportunity for a public hearing on the record.
- Second, the Commission must take into consideration the Technical Guidelines Development Committee's recommendations.
- Third, the Commission must submit the proposed guidelines to the Board of Advisors and Standards Board for review and opportunity to comment.
- Finally, the Commission must vote to adopt any new guideline or modification, which cannot occur until 90 days have passed since the Commission submitted the proposed guidelines to the Board of Advisors and Standards Board.

Regardless of the merits of the Order's proposed standards for voting systems, the Commission must also consider the impact of the Order's suggested actions on states. According to the Commission's research, 11 states and Washington, D.C. have state statutes and/or regulations that require all voting systems used in the state to be federally-certified.[30] Rescinding all previous certifications of voting systems would leave these states without any legally-available voting system option until a voting system can be certified to the amended VVSG 2.0—a process

[29] Alaska, California, District of Columbia, Illinois, Kansas, Maryland, Massachusetts, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Texas, Utah, Virginia, Washington, and West Virginia allow for this.

[30] U.S. Election Assistance Commission, State Requirements and the U.S. Election Assistance Commission Voting System Testing and Certification Program, August 3, 2023, https://tinyurl.com/2x9zd6at.

that could take years, as evidenced by the fact that no voting system is yet certified to VVSG 2.0 four years after the Commission adopted the new guidelines. While states that do not require federal certification may continue to use their existing systems, the loss of certification signifying satisfaction of federal election security standards could cause significant harm to public confidence among these states' voters.

For these reasons, we urge the Commission to take no action in response to the Executive Order.

Respectfully submitted,

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